

SLOVER & LOFTUS LLP

ATTORNEYS AT LAW

1224 SEVENTEENTH STREET, N. W.

WASHINGTON, D. C. 20036-3003

WILLIAM L. SLOVER
C. MICHAEL LOFTUS
JOHN H. LE SEUR
KELVIN J. DOWD
ROBERT D. ROSENBERG
CHRISTOPHER A. MILLS
FRANK J. PERGOLIZZI
ANDREW B. KOLESAR III
PETER A. PFOHL
DANIEL M. JAFFE
STEPHANIE P. LYONS
JOSHUA M. HOFFMAN

OF COUNSEL
DONALD G. AVERY

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TELEPHONE:
(202) 347-7170

FAX:
(202) 347-3619

WRITER'S E-MAIL:
sma@sloverandloftus.com

September 8, 2009

BY HAND DELIVERY

The Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

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225706



Re: Docket No. 42104, *Entergy Arkansas, Inc. and Entergy Services, Inc. v. Union Pacific R.R. and Missouri & Northern Arkansas R.R. Co., Inc.*;
F.D. No. 32187, *Missouri & Northern Arkansas R.R. – Lease, Acquisition and Operation Exemption – Missouri Pacific R.R. and Burlington N. R.R.*

Dear Ms. Quinlan:

Enclosed for **FILING UNDER SEAL** in the above-referenced proceeding please find a separately packaged original and ten (10) copies of Entergy's Reply in Opposition to M&NA's Motion to Dismiss. We also have enclosed an original and ten (10) copies of a **REDACTED, PUBLIC** version of Entergy's Reply for filing on the Board's public docket.

Finally, we have enclosed additional copies of each version of the filing to be date-stamped and returned to the bearer of this letter. Thank you for your attention to this matter.

Sincerely,

Stephanie M. Adams

Stephanie M. Adams
An Attorney for Entergy Arkansas, Inc.
and Entergy Services, Inc.

Enclosures

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

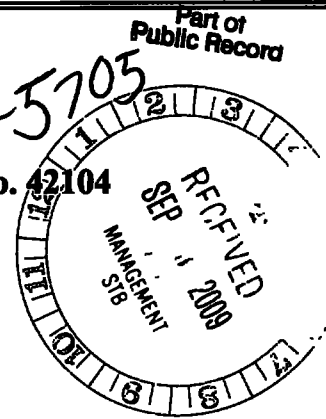
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Office of Proceedings
SEP - 8 2009

**ENTERGY ARKANSAS, INC. and
ENTERGY SERVICES, INC., Complainants**

v.

**UNION PACIFIC RAILROAD
COMPANY and MISSOURI &
NORTHERN ARKANSAS RAILROAD
COMPANY, INC., Defendants.**

Docket No. 42104



**MISSOURI & NORTHERN ARKANSAS
R.R. - LEASE, ACQUISITION AND
OPERATION EXEMPTION - MISSOURI
PACIFIC R.R. and BURLINGTON
NORTHERN R.R.**

Finance Docket No. 32187

REPLY IN OPPOSITION TO MOTION TO DISMISS

***PUBLIC VERSION - HIGHLY CONFIDENTIAL
INFORMATION HAS BEEN REDACTED***

**ENTERGY ARKANSAS, INC. and
ENTERGY SERVICES, INC.
O.H. Storey
Cory R. Cahn
P.O. Box 551
Little Rock, AR 72203**

OF COUNSEL:

**Slover & Loftus LLP
1224 Seventeenth St., N.W.
Washington, D.C. 20036
(202) 347-7170**

**By: C. Michael Loftus
Frank J. Pergolizzi
Andrew B. Kolesar III
Stephanie M. Adams
1224 Seventeenth Street, N.W.
Washington, D.C. 20036**

Dated: September 8, 2009

Attorneys & Practitioners

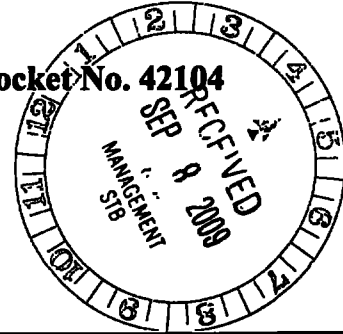
**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**ENTERGY ARKANSAS, INC. and
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v.

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Docket No. 42104



**MISSOURI & NORTHERN ARKANSAS
R.R. – LEASE, ACQUISITION AND
OPERATION EXEMPTION – MISSOURI
PACIFIC R.R. and BURLINGTON
NORTHERN R.R.**

Finance Docket No. 32187

**ENTERGY'S REPLY
IN OPPOSITION TO M&NA'S MOTION TO DISMISS**

Complainants Entergy Arkansas, Inc. ("EAI") and Entergy Services, Inc. ("ESI") (collectively, "Entergy") submit this Reply in Opposition to the Motion to Dismiss ("Motion") filed by the Defendant Missouri & Northern Arkansas Railroad Company, Inc. ("M&NA") on August 17, 2009. In support hereof, Entergy states as follows:

SUMMARY

M&NA's Motion fails to provide any basis upon which the Board should dismiss Entergy's Amended Complaint.

The Board can dismiss a complaint only if the complaint “does not state reasonable grounds for investigation and action.” 49 U.S.C. § 11701(b). Under governing Board precedent, motions to dismiss are “disfavored . . . and rarely granted.”³ M&NA’s Motion provides no grounds for the Board to make a special exception to this general rule.

In its Motion, M&NA argues that Entergy’s Complaint should be dismissed because a necessary defendant is missing; a contract governing the movement of coal from the Powder River Basin (“PRB”) to Entergy’s Independence power plant is in effect; and a through route between M&NA and Class I railroads besides UP exists. M&NA’s contentions are insufficient to warrant dismissal. Specifically, (1) no necessary parties are missing as BNSF is a party to this proceeding; (2) the existing contracts for the transportation of coal {

}; and (3) the existing M&NA tariff only offers per-car rates.

³ See *Garden Spot & Northern Ltd. Partnership and Indiana Hi-Rail Corp. -- Purchase and Operate -- Indiana Rail Road Co. Line Between Newtom and Browns, IL*, ICC Finance Docket No. 31593, 1992 WL 389440 at *2 (ICC served Jan. 5, 1993).

ARGUMENT

I. NO NECESSARY PARTIES ARE MISSING FROM THIS PROCEEDING

Entergy's February 19, 2008 Complaint, and the evidence filed in support thereof, confirmed that the continued enforcement of certain provisions of a 1992 lease agreement between UP and M&NA precludes the interchange of traffic with a long-haul carrier other than UP. *See Entergy Arkansas, Inc. and Entergy Services, Inc., v. Union Pacific R.R. and Missouri & Northern Arkansas R.R.*, STB Docket No. 42104, et al. (STB served June 26, 2009) ("Decision"). In its June 26, 2009 Decision, the Board "provide[d] an opportunity for the shipper to pursue this case under the appropriate provision" of the statute. *Id.* At the Board's direction, Entergy subsequently filed an Amended Complaint seeking the prescription of a through route (or through routes) to thereby obtain relief from the UP/M&NA paper barrier.

M&NA argues that Entergy's Amended Complaint should be dismissed because "M&NA is the only party defendant to the through route prescription" and a "necessary defendant party is missing from the Amended Complaint." Motion at 4. As such, it maintains that "the Board cannot make the necessary comparison required in its rules" for through route prescriptions. *Id.* M&NA's arguments lift form over substance. BNSF – the potential through route carrier – is, in fact, a party to this proceeding. BNSF and its predecessor (BN)

have been parties, albeit inactive parties, to Finance Docket No. 32187 for the past 17 years – since 1992. *See Missouri & N. Arkansas R.R. Co., Inc. – Lease, Acquisition & Operation Exemption – Missouri Pac. R.R. Co. & Burlington N. R.R. Co.*, Finance Docket No. 32187, 1992 WL 379843 (ICC served Dec. 22, 1992). In 2008, BNSF filed a letter with the Board advising that, although its predecessor in interest, BN, was a named party to Docket No. 32187 it chose to forego “filing a formal answer to Entergy’s Verified Complaint or alternative Petition to Revoke.” Letter from Adrian L. Steel, Jr., counsel for BNSF, to The Honorable Anne K. Quinlan, Acting Secretary of the STB (March 10, 2008). However, in its letter, BNSF noted that it reserved “the right to participate in the proceeding should its interests be implicated in the future.” *Id.* Because BNSF has been a party to this proceeding since its inception, the Board is unlikely to encounter any obstacles in making any necessary comparisons required by its rules for through route prescriptions. In any event, if the Board finds that BNSF’s current status as a party is insufficient for the relief sought, the proper solution would be to grant Entergy leave to amend its Complaint and include BNSF as a defendant.

II.

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III.
THE EXISTING M&NA TARIFF IS
NOT SUITED TO UNIT TRAIN TRANSPORTATION

Finally, M&NA argues that Entergy's requested relief is unnecessary because M&NA Tariff 8006-C ("Tariff") permits "the use of a through route between M&NA and BNSF over the route between the PRB and Entergy's Independence, AR power plant." Motion at 5.

The M&NA Tariff, however, only governs per-car movements and Entergy seeks a unit train through route prescription. *Cf. Denver & Rio Grande W. R.R. Co. v. Union Pac. R.R. Co.*, 351 U.S. 321, 328 (1956) (holding that the ICC did not err in finding that a through route did not exist in light of all the evidence, including an amended tariff resulting in "very high combination rates" for traffic moving over the allegedly existing through route). Furthermore, moving substantial volumes of coal (as much as {

})) on the per-car Tariff

would be an impractical and prohibitively expensive alternative for Entergy. Indeed, both the Board and its predecessor have acknowledged that a per-car tariff is inappropriate for the movement of a unit train. *See W. Texas Utilities Co. v. Burlington N. R.R. Co.*, I.C.C. Docket No. 41191 (I.C.C. served Oct. 14, 1994) petition for review on other grounds granted in *Burlington N. R.R. Co. v. I.C.C.*, 75 F.3d 685 (D.C. Cir. 1996); *W. Resources v. The Atchison, Topeka & Santa Fe Ry. Co.*, STB Docket No. 41604 (STB served May 17, 1996).

CONCLUSION


For the reasons set forth above, Entergy respectfully requests that the Board deny M&NA's Motion.

Respectfully submitted,

ENTERGY ARKANSAS, INC.
and
ENTERGY SERVICES, INC.
O.H. Storey
Cory R. Cahn
P.O. Box 551
Little Rock, AR 72203

OF COUNSEL:

Slover & Loftus LLP
1224 Seventeenth St., N.W.
Washington, D.C. 20036
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By: C. Michael Loftus
Frank J. Pergolizzi
Andrew B. Kolesar III
Stephanie M. Adams
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Attorneys & Practitioners

Dated: September 8, 2009

CERTIFICATE OF SERVICE

I hereby certify that this 8th day of September, 2009, I served copies of the Highly Confidential and Public Versions of the foregoing Reply in Opposition to M&NA's Motion to Dismiss on counsel for the parties of record both by email and by first-class mail, postage prepaid.


Stephanie M. Adams